Supreme Court, U.S.
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No.:

In the
SUPREME COURT OF THE UNITED STATES

Mack A. O'Baner
Petitioner

v.

The State of Tennessee
Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

First Question:

Did the Tennessee courts err in not retroactively applying a change in the law regarding the state's burden of proof as to the *mens rea* element of intent in first-degree murder?

Second Question:

Did the Tennessee courts err by relying upon a faulty jury instruction that lessened the state's burden of proof and thereby convicted petitioner without proving every element of the crime beyond a reasonable doubt?

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

Trial & Direct Appeal Court

State of Tennessee v. Mack A. O'Baner, No. 00-08230 (Criminal Court, Shelby County 01-25-2001)

State of Tennessee v. Mack A. O'Baner, No. W2001-00815-CCA-R3-CD (Tenn.Crim.App. March 15, 2002) (no application for permission to appeal)

Post-Conviction Court

Mack A. O'Baner v. State of Tennessee, P27087

Mack A. O'Baner v. State of Tennessee, W2003-01945-CCA-R3-PC (Tenn. Crim. App. 6-8-2004) (application for permission to appeal denied (No.W2003-01945-SC-R11-PC, 11-15-2004)).

BASIS OF JURISDICTION

On November 15, 2004 the Tennessee Supreme Court denied the application for permission to appeal from the Court Of Criminal Appeals holding which affirmed a summary dismissal of a Petition for Post-Conviction without ruling on the Federal Constitutional Due Process Arguments presented.

No rehearing was requested in the State Court and this Writ is filed within the ninety-day limit upon seeking review.

Jurisdiction is conferred on this Court via the United State Constitution, Article III, Section 2, as this appeal deals solely with United States Constitutional issues. See, also, *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816); Section 25 of the Judiciary Act of 1789.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 25, 2001, the Petitioner, Mack A. O'Baner was convicted of the first-degree murder of his ex-wife, Cassaundra Mason. On January 12, 2000, Ms. Mason was at work when she went to retrieve something from her car. A few minutes later, several employees heard gunshots. Two witnesses ran to the parking lot and observed the victim lying injured on the ground and a small black car slowly driving away. Within the hour, Mack A. O'Baner entered the East Precinct of the Memphis Police Department and informed officers that he had "just shot [his] wife." *O'Baner v. State*, W2003-01945-CCA-R3-PC, *2 (Tenn. Crim. App. 6-8-2004) (hereinafter "*O'Baner I*") (citing to *State v. O'Baner*, No. W2001-00815-CCA-R3-CD, 2002 WL 1482685 at *1 (Tenn. Crim. App. Mar. 15, 2002) (no app. filed) for the evidence supporting the Petitioner's conviction).

The Defendant contended at trial that he recently ended his relationship with the victim. He stated that Ms. Mason was angry with him due to his relationship with another woman. The Defendant testified that on January 12, while the two where talking in the parking lot, Ms. Mason charged him while wielding a box cutter, and he shot her in self-defense. *Id.* The Defendant never mentioned Ms. Mason's alleged aggression to the police, and no box cutter was found at the scene. *Id.*

Mr. O'Baner timely appealed the conviction to the Court of Criminal Appeals (hereinafter "the CCA") of Tennessee and raised the single issue as to the sufficiency of the evidence. The CCA held that the evidence was sufficient and affirmed the conviction on March 15, 2002. *State v. O'Baner*, No. W2001-00815-CCA-R3-CD, 2002 WL 1482685 at *1 (Tenn.Crim.App. Mar. 15, 2002) (no app. filed).

The month after the CCA affirmed the conviction, the standard jury instruction for "knowingly" as it related to second-degree murder was held to be faulty as it *improperly lessened the State's burden of proof*, allowing a verdict to be reached based solely upon the defendant's awareness that he was engaging in certain conduct. *State v. Page*, 81 S.W.3d 781 (Tenn.Crim.App. 2002).

The *O'Baner* trial court charged the jury with the following standard jury instruction that contained the same faulty definition found in *Page*:

> Any person who commits the offense of first-degree murder is guilty of a crime. For you to find the defendant guilty of this offence, the state must have proven beyond a reasonable doubt the existence of the following essential elements: (1) that the defendant unlawfully killed the alleged victim; and (2) that the defendant acted intentionally. A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result... (emphasis added)

Likewise, the trial court used the same instruction as in *Page* that included an improper standard of *mens rea*:

> Any person who commits second-degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: (1) that the defendant unlawfully killed the alleged victim; and (2) that the killing was knowing. "Knowing" means that a

> person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. ...(emphasis added)

Both these instructions improperly include elements that allow a jury to convict based upon a defendant's awareness of the nature of his conduct. Tennessee case law is clear that a knowing murder is strictly a result of conduct offense. *State v. Page*, 81 S.W.3d at 787 (quoting *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000)).

The jury did not have to decide whether the Appellant possessed the conscious objective or desire to cause the alleged victim's death. Indeed, the following proposed jury instructions, authored by the *Page* court unambiguously omits any language instructing a jury to convict based upon a defendant's awareness of the nature of his conduct:

> Any person who commits the offense of first-degree murder is guilty of a crime...A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.
>
> ...
>
> Any person who commits second degree murder is guilty of a crime..."Knowingly" means that a person acts with an awareness that [his] [her] conduct is reasonably certain to cause the death of the alleged victim...(*Page* at 790) (emphasis added)

Tennessee Code Annotated § 40-30-206(g)(1) states that a Petition of Post-Conviction can be "based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right."

On Feburary 6, 2003, Petitioner timely filed a Petition for Post-Conviction Relief alleging as grounds for relief that (1) his appointed counsel was ineffective for not requesting a *Page* jury instruction (hereinafter "IAC") and (2) that the Page violation lessened the State's burden of proof and violated his "due process right to protection of the laws under the Fifth and Fourteenth Amendments to the Constitution of the United States." Clearly, the second argument states a federal question of law thereby invoking the jurisdiction of this Court.

On September 8, 2003 the post-conviction trial court summarily dismissed the petition without an evidentiary hearing. The trial judge in his Order Denying Petition for Post-Conviction Relief erroneously stated that "petitioner's sole claim in his petition is that his attorney was ineffective for failing to object to jury instructions that the Tennessee Criminal Court of Appeals later held to be invalid." The Order never even mentioned the federal issue of Due Process and retroactivity.

The trial judge reasoned that since the jury had concluded that the "defendant, either before the day of the offense, or while engaged in the conduct, displayed a previously formed design or intent to kill" it was harmless error that the jury did not "have the opportunity to determine whether the defendant was aware that his conduct [at the time of the act] was reasonable certain to cause death." Also see, *State v. Hill*, 2002 WL 31780718 (Tenn.Crim.App. 2002).

Petitioner timely appealed this summary dismissal to the Court of Criminal Appeals of Tennessee and raised the issue that the trial court erred in not holding a hearing to

determine whether or not the jury instruction that lower the State's burden of proof denied "the petitioner his due process right to [the] protection of the laws under the Fifth and Fourteenth Amendments to the Constitution of the United States" and thus "required retroactive application." Appellant's Brief to the Court of Criminal Appeals, *Mack A. O'Baner v. State of Tennessee*, W2003-01945-CCA-R3-PC (Tenn. Crim. App. 6-8-2004) (application for appeal denied (No.W2003-01945-SC-R11-PC, 11-15-2004)), pgs. i & 1. Further, the Petitioner alleged, "it is clear that [the] erroneous jury instruction created a Due Process violation" and cited the *Page* case for authority. Again, Petitioner clearly raised issues appropriate for review by this Court.

The Court of Criminal Appeals filed its opinion on June 8, 2004. The appellate court referenced that the "petitioner filed a post-conviction petition alleging that his due process rights were violated" and "petitioner's post-conviction petition raised allegations of due process deprivations." *O'Baner I*, at **1 & 3. While having referenced the federal issues at hand, the court issued its ruling without addressing the substance of the retroactive/due process issues.

The appellate court held that the petition failed to raise a colorable post-conviction claim as "this Court has consistently held that any error in jury instructions under *State v. Page*, [81 S.W.3d 781 (Tenn.Crim.App. 2002)] is harmless beyond a reasonable doubt where, as in the instant case, the defendant is convicted of first degree murder" after raising the issue of self-defense. The appellant court went on to say that it reasoned that where a jury has concluded beyond a reasonable doubt that the defendant "premeditated" or "formed a preconceived design to assist or commit a murder" then the issue of intent to cause death

which includes the faulty definition of "knowingly" is clearly resolved in favor of the State as harmless error.[1]

Petitioner timely file a application for permission to appeal to the Supreme Court of Tennessee raising the following two questions:

> Question 1. Did the Court of appeals err in affirming the trial court's summary dismissal of Petitioner's Petition for Post-Conviction Relief that was based on T.C.A.§ 40-30-206 (g)(1) [the Code Statute that states a petition for post-conviction can be "based upon a constitutional right . . . [that] requires retroactive application].

and,

> Question 2. Is the Sate and Federal Due Process Clauses violated by allowing a conviction to stand based on a jury instruction that impermissibly lowers the State's burden of proof in violation of the Defendant's Due Process.

The application for permission to appeal specifically stated that the application was based on federal constitutional issues and that the trial court erred in not

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[1] This suggestion that a defendant admits intent to kill by pleading that he acted in self-defense has been expressly rejected by some appellant courts. See, *Mason v. Balkcom*, 669F.2d 222, 227 (5th Cir. Unit B 1982) (holding that "when claiming self-defense, one does not necessarily admit intent to kill, but rather admits that the killing occurred. . . . one can shoot to kill in self-defense, shoot to wound in self-defense, shoot to frighten in self-defense, or even shoot reactively in self-defense with no specific purpose. The mere raising of self-defense clearly does not establish that the defendant had the intent to kill . . . .").

hearing arguments on the retroactive application of the *Page* case.

Also raised was the argument that federal law and due process required the conviction to be vacated if retroactive analysis was not required. Petitioner cited *Buckley v. Florida*, 538 U.S. 835 (2003) and *Fiore v. White*, 531 U.S. 225 (2001) as support. Each of these cases held that the Due Process Clause was violated when an essential element was not proven beyond a reasonable doubt, as is the case herein where the State relies on a jury instruction that lessened the State's burden of proof.

The Supreme Court, on November 15, 2004 denied the application for appeal and this Petition For Writ of Certiorari is timely filed asking this Court to review the Due Process violations caused by the faulty jury instructions and the lessening of the State's burden of proof.

ARGUMENT

I. THE TENNESSEE COURTS ERRED IN NOT RETROACTIVELY APPLYING A CHANGE IN THE LAW REGARDING THE STATE'S BURDEN OF PROOF AS TO THE *MENS REA* ELEMENT OF INTENT IN FIRST-DEGREE MURDER CASES.

With the recent holdings in *Ring* and *Apprendi*, this Court has seen an increase in cases seeking retroactive applications of "new rules" of law. Furthermore, this case directly addresses the question regarding retroactivity of state criminal statutes left unanswered in this Court's ruling

in *Fiore v. White*, 531 U.S. 225 (2001) (deciding that the question of retroactivity upon which certiorari was granted disappeared by the state court's answer of a certified question that its ruling "merely clarified the plain language of the statute.").

When a decision results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). As to cases on collateral review, these changes only apply in limited circumstances. New *substantive* rules generally apply retroactively while those that are *procedural* do not. *Schriro v. Summerlin*, 124 S.Ct. 2519, 159 L.Ed.2d 442, 72 USLW 4561 (2004) (holding the *Ring* was properly classified as procedural rather than substantive, and thus did not apply retroactively on collateral review).

Included in the rubric of substantive rules applied retroactively are those decisions that narrow the scope of a criminal statute by interpreting its terms, see *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), as well as decisions that place certain conduct or persons covered by the statute beyond the State power to punish, see *Saffle v. Parks*, 494 U.S. 484 (1990); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion).[2] Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces punishment that the law cannot impose upon him. *Bousley*, supra, at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See *Bousley*, at 620-21. (rule "hold[s] that a .

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[2] This Court has sometimes referred to this latter type as falling under an exception of *Teague's* bar on retroactive application of procedural rules, see, e.g., *Horn v. Banks*, 536 U.S. 266, 271, and n. 5 (2002)(per curiam); however, in *Schriro*, supra, n.4, the Court stated that "they are more accurately characterized as substantive rules not subject to the bar.

. . statute does not reach certain conduct" or " make[s] conduct criminal"); *Saffle*, at 495 (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons").[3]

A decision that modifies the elements of an offense is normally substantive rather than procedural. *Schriro*, *supra*, at *2524. These modifications of the elements alter the range of conduct punished and therefore render some formerly unlawful conduct lawful or vice versa. See *Bousley*, 523 U.S., at 620-21.

The *Page*[4] decision modified the definition of a critical element of the murder statute in Tennessee; the definition of knowing and the required *mens rea* to be culpable of murder. In Tennessee, by statute, "knowing" is defined as follows:

> "knowing" refers to a person who acts knowingly with respect to the conduct or to the circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonable certain to cause the result.

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[3] The *Page* decision clearly decriminalized a class of conduct or a class of persons who acted knowingly as to the "nature of their conduct" as apposed to the "result of the conduct." To have committed a murder, the defendant had to act with knowledge as to the results (e.g., the defendant had to be aware that the conduct is reasonable certain to cause the result) and not with knowledge as to the "nature of the conduct" (e.g., awareness of the nature of the conduct or that circumstances existed, but not aware that the conduct is reasonable certain to cause the result).

[4] *State v. Page*, 81 S.W.3d 781 (Tenn.Crim.App. 2002).

Prior to *Page*, the definition, *supra*, of "knowing" was applied to the crime of murder.[5] However, *Page* held that murder is strictly a "result-of-conduct" offense.[6] The holding of *Page* was that "[t]he result of the conduct is the only conduct *element* of the offense. . . ." (emphasis added). The *Page* holding modified an element of the offense and is therefore substantive and should have been applied retroactively by the post-conviction court. *Schriro*, *supra*, at *2524.

Clearly, the *Page* court intended to eliminate *nature of conduct* from both the knowing element of second-degree murder and the element of intent in first-degree murder. As such, Appellant was found guilty based upon an improper standard of *mens rea* (allowing a jury to reach a verdict based solely upon his awareness that he was engaging in certain conduct) and was denied a fair and accurate jury instruction. *Page v. State*, 81 S.W.3d 781, 788 (Tenn.Crim.App. 2002); *State v. Teel*, 793 S.W.2d 236, 249 (Tenn. 1990).

"A defendant has the constitutional right to complete and accurate jury instructions on the law; the failure to do so deprives a defendant of the constitutional right to a jury trial." *Page* at 789 (quoting *Teel* at 249). A jury instruction that allows a jury to convict only upon the awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the State's burden of proof. *Page* at 778. The faulty instructions allowed the jury to convict without deciding whether the defendant possessed the conscience objective or desire to cause the alleged victim's death. Since the only real issue at trial was the degree of homicide committed, which in turn rested on the *mens rea* and appropriate conduct

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[5] See, pg. 2, supra, for per-*Page* jury instruction defining "knowingly."
[6] See, pg. 3, supra, for post-*Page* jury instruction defining "knowingly."

element, it is clear that an erroneous jury instruction created a Due Process violation. *Id.*

Even if this change in the law is found to be procedural, it meets the *Teague* criteria for retroactive application. In *Teague*, the plurality opinion set forth new criteria to use in determining whether to apply a procedure rule retroactively. A new rule would be applied retroactively in collateral review if it was (1) "implicit in the concept of ordered liberty," implicating "fundamental fairness," and (2) was "central to an accurate determination of innocence or guilt," such that its absence would "create an impermissibly large risk that the innocent will be convicted." *Teague*, 489 U.S., at 311-313.

Obviously, correct jury instructions and proper burdens of proof are implicit in the concept of liberty. See, *Sandstrom v. Montana*, 442 U.S. 510 (1979); *In re Winship*, 397 U.S. 358 (1970). Likewise, the incorrect jury instruction as to the required *mens rea* calls into question the very question of guilt or innocence. This error in the *mens rea* lowered the poof necessary to convict and therefore, the State did not prove every element of the crime beyond a reasonable doubt. *Sandstrom*, at 515.

Therefore, this cause should be remanded with instructions to apply the change in the law retroactively and grant Petitioner a new trial.

II. THE TENNESSEE COURTS ERRED BY RELYING UPON A FAULTY JURY INSTRUCTION THAT LESSENED THE STATE'S BURDEN OF PROOF AND THEREBY CONVICTED PETITIONER WITHOUT PROVING EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

If the *Page* violation appealed by Petitioner is not subject to retroactive application, due process still demands that the conviction be vacated. Application of the due process principles of *Fiore v. White*, 531 U.S. 225 (2001), may render retroactive analysis unnecessary. If the *Page* holding[7] was a correct statement of the law at the time of the Petitioner's conviction, then the State obtained the conviction with a jury instruction that impermissibly lowered the State burden of proof. That lowering of the burden of proof would violate Petitioner's due process and the State would be unable to ensure it convicted O'Baner beyond a reasonable doubt as to every element of the crime.

Fiore v. White involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after the defendant Fiore's conviction became final. See, *Fiore*, 531 U.S., at 226. Under the Pennsylvania Supreme Court's interpretation of the criminal statute, Fiore could not have been guilty of the crime for which he was convicted. *Id.* at 226-27. This Court granted certiorari to consider "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a criminal statute retroactively to cases on collateral review. *Id.* at 226.

This Court was uncertain whether the State's Supreme Court ruling represented a change in the law and thus certified a question asking whether the Pennsylvania Supreme Court's interpretation of the statute "state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final." *Id.* The state court replied that the ruling "merely clarified the plain language of the statute." Pennsylvania's answer revealed the "simple, inevitable conclusion" that Fiore's conviction violated due process. *Id.* at 229.

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[7] Holding that the "knowing" *mens rea* element of murder was a "result of conduct" only crime.

It has long been established by this Court that "the Due Process Clause . . . forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.* at 228-29. Because the State had failed to prove one of the elements of the crime beyond a reasonable doubt, Fiore's "conviction did not satisfy the strictures of the Due Process Clause. Consequently, 'retroactivity [was] not at issue.'" *Bunkley v. Florida*, 538 U.S. 835, 840 (2003) (quoting *Fiore*, at 226).

Application of the due process principles of *Fiore* may render the retroactive analysis unnecessary. If the law in Tennessee when Mack O'Baner's conviction became final was as *Page* held, then the State would be unable to say it proved every element beyond a reasonable doubt and the conviction could not stand. *In re Winship*, 397 U.S. 358 (1970).

The Tennessee Supreme Court, in *Page*, concedes that there was a lack of clarity as to the proper instructions for the "knowingly" component of murder:

> In fairness to the trial court, it was far from clear at the time of trial how the "knowing" mens rea for second degree murder should be defined in jury instructions. The trial court's charge on the definition of "knowing" was verbatim from [the Tennessee Pattern Instructions – Criminal] 2.09 (5th ed. 2000). In *Ducker*, [27 S.W.3d 889 (Tenn. 2000) (holding that the crime of aggravated child abuse was solely a result-of-conduct offense] decided only months prior to the trial [of Page], our supreme court did state that second degree murder was a "result-of-conduct" offense. However, Ducker was not a second degree murder case; nor did *Ducker* discuss jury

> charges for result-of-conduct offenses. *Id.* at 897. The first case to actually find reversible error in the failure to charge second degree murder as strictly a result-of-conduct offense was *State v. Keith T. Dupree*, No. W1999-01019-CCA-R3-CD, 2001 WL 91794, at *4 (TennCrim.App. Jan. 30, 2001), *no perm to app. filed*; however, *Dupree* was filed several days after the trial [of Page].

State v. Page, 81 S.W.3d, at 787-88.

If the correct statement of the law, at the time Petitioner was convicted, was as *Page* holds, he was convicted on a lesser *mens rea* element than was the law at the time. He would not have been convicted of a crime in which every element was proven beyond a reasonable doubt and therefore, his conviction would violate due process. *Fiore v. White*, 531 U.S., at 228-29.

Therefore, for the aforementioned law and arguments, Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari and order briefing on the merits.

Respectfully Submitted;

/s/ Marty McAfee

/s/ Claiborne H. Ferguson

APPENDIX

Order Denying Petition for Post-Conviction Relief, No. P-27087, Shelby County Trial Court, September 8, 2003 16

O'Baner v. State, W2003-01945-CCA-R3-PC (Tenn.Crim.App. June 8, 2004) 19

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Order Denying Petition for Post-Conviction Relief, No. P-27087, Shelby County Trial Court, September 8, 2003

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
DIVISION VII

MACK O'BANER
Petitioner

v.

STATE OF TENNESSEE
Appellee

No. 27087
Date Filed: 9-10-03
By: /s/JMC D.C.

ORDER DENYING PETITION
FOR POST-CONVICTION RELIEF

This matter comes before this Court on a PETITION FOR POST-CONVICTION RELIEF, filed through counsel, by the Petitioner, Mack A. O'Baner. The petitioner was convicted on January 25,2001 of first-degree murder and sentenced to life imprisonment. On Match 15,2002, the Court of Criminal Appeals found no reversible error and affirmed the judgment of the trial court. Petitioner now moves this court for relief based on a claim of ineffective assistance at trial.

BASIS FOR RELIEF

The petitioner's sole claim in his petition is that his attorney was ineffective for failing to object to jury instructions that the Tennessee Criminal Court of Appeals later held to be invalid. Trial Judge Chris Craft gave the following jury charge relating to first-degree murder:

> Any person who commits the offense of first-degree murder is guilty of a crime. For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: (1) that the defendant unlawfully killed the alleged victim; and (2) that the defendant acted intentionally. A person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result... (Jury-Charge, 3)

The petitioner claims this jury charge allowed the jury to convict the petitioner based upon his awareness of the *nature of his conduct.* The petitioner cites State v. Page, 81 S.W.3d 781 (Tenn.Crim.App. 2002) and argues that its holding as to a second-degree murder charge applies to first-degree murder as well. In Page the court held that the jury charge for second-degree murder allowed the defendant to be convicted based solely upon an awareness of the *nature of the conduct.* This improperly lowered the burden of the prosecution by not requiring a finding that the defendant was aware that his conduct might cause death. Page, at 790. The Page court included in their opinion an appendix that outlined proposed jury instructions for both second-degree and first-degree murder. The petitioner alleges ineffective assistance at trial based on his trial counsel's failure to object to the improper jury charge.

ANALYSIS

This court will begin by noting that the Page decision was not published until some sixteen months after the petitioner was convicted. This would have made it impossible

for trial counsel to object with any authority. The underlying issue, however, will be considered by this court. In the case at bar, as in the Page case, there is no question as to the defendant's killing of the victim. The only issue, therefore, concerns the mental state of the petitioner at the time of the murder. The petitioner was convicted of first-degree murder. A conviction of first-degree murder requires a showing that the defendant acted with premeditation. T.C.A. § 39-13-202(a)(l). The concern of the Page court was that the jury did not have an opportunity to determine whether the defendant was aware that his conduct was reasonable certain to cause death. In the case at bar, the jury concluded that the defendant, either before the day of the offense, or while engaged in the conduct, displayed a previously formed design or intent to kill. State v. Hill, 2002 WL 31780718 (Tenn.Crim.App. 2002) citing State v. West, 844 S.W.2d 144, 147 (Tenn. 1992). The Court of Criminal Appeals affirmed the judgment following a challenge by the petitioner to the sufficiency of the evidence concerning premeditation. State v. O'Baner, 2002 WL 1482685 (Tenn.Crim.App. 2002). The petitioner's claim the jury instruction was error is correct. The error, however, was harmless because the jury determined the issue of intent to cause death. Hill, at 5.

Conclusion

The Petitioner's claim of ineffective assistance at trial is without merit. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Petitioner's PETITION OF POST CONVICTION RELIEF is **DENIED**.

Entered this 8 day of September, 2003

/s/ Arthur T. Bennett
Judge, Division VII

O'BANER v. STATE, W2003-01945-CCA-R3-PC
(Tenn.Crim.App. 6-8-2004)

MACK A. O'BANER v. STATE OF TENNESSEE.

No. W2003-01945-CCA-R3-PC.

Court of Criminal Appeals of Tennessee, at Jackson.

May 4, 2004 Session.

Filed June 8, 2004.

Appeal from the Criminal Court for Shelby County; No. P-27087; Arthur T. Bennett, Judge.

Judgment of the Trial Court is Affirmed.

Claiborne H. Ferguson, Memphis, Tennessee for the appellant, Mack A. O'BANER

Paul G. Summers, Attorney General & Reporter; Thomas E. Williams, III, Assistant Attorney General; William L. Gibbons, District Attorney General, for the appellee, State of Tennessee.

Jerry L. Smith, J., delivered the opinion of the court, in which Joseph M. Tipton, and James Curwood Witt, Jr., JJ., joined.

OPINION

JERRY L. SMITH, JUDGE.

The petitioner, Mack A. O'BANER, was convicted by a Shelby County jury of the offense of first degree murder. He was sentenced to life imprisonment. On direct appeal this Court affirmed the convictions. See State v. Mack A. O'Baner, No. W2001-00815-CCA-R3-CD, Shelby County, (filed March 15, 2002, at Jackson). On February 6, 2003, the petitioner filed a post-conviction petition alleging that his due process rights were violated by a jury instruction on second degree murder which failed to specify that second degree murder committed through a "knowing killing of another" was strictly a "result-of-conduct offense." See State v. Page, 81 S.W.3d 781, 790 (Tenn. Crim. App. 2002). The petition also alleged that his trial and appellate counsel were ineffective in failing to challenge the jury instructions given as being violative of the holding in Page. The trial court summarily dismissed the petition finding inter alia that, because he was convicted of first degree murder the petitioner could not establish prejudice as a result of his claims. After a review of the record and the applicable authorities we affirm the judgment of the trial court.

Factual Background

Trial Evidence

As summarized by this Court in the direct appeal of this case the evidence supporting the petitioner's conviction is as follows:

In December of 1997, the Defendant married Cassaundra Mason, the victim in this case. One month later, they

separated. They were divorced in April of 1998. Approximately a year later, the two resumed a casual romantic relationship. The victim worked at Corporate Express in Memphis, and around 2:00 p.m. on January 12, 2000, two of the victim's co-workers observed the Defendant circling through the company parking lot in his small black car prior to the victim's arrival.

> When the victim arrived at work, she briefly conversed with co-workers and then went to retrieve bsomething from her car. A few minutes later, several employees heard two quick gunshots followed by several more. Two witnesses ran to the parking lot and saw the victim lying injured on the pavement and a small black car slowly driving away. At 2:50 p.m., the Defendant entered the East Precinct of the Memphis Police Department and informed officers that he "just shot [his] wife." When asked why he shot the victim, the Defendant replied:
>
> I came to a point that I had to make a decision and I made it. She knows what it's about and so do I. I feel sorry for people that are killed in car and plane crashes, but I don't feel sorry for Cassaundra.
>
> [The Petitioner] then told police that they would find the gun he used in his car which was parked outside of the station.
>
> Dr. Cynthia Gardner, the Shelby County Medical Examiner, testified that the victim was shot eight times. Dr. Gardner stated that the bullets injured vital organs and caused massive bleeding which

> ultimately led to the victim's death. Tennessee Bureau of Investigation Officer Don Carmen testified that the bullets recovered from Ms. Mason's body were all fired from the gun found in the Defendant's car.
>
> The Defendant contended at trial that he recently ended his relationship with the victim. He stated that Ms. Mason was angry with him due to his relationship with another woman. The Defendant testified that, on January 12 while the two were talking in the Corporate Express parking lot, Ms. Mason charged him while wielding a box cutter, and he shot her in self-defense. The Defendant further stated that he did not remember how many shots he fired at the victim. The Defendant never mentioned Ms. Mason's alleged aggression to the police, and no box cutter was found at the scene.

State v. O'Baner, No. W2001-00815-CCA-R3-CD, 2002 WL 1482685 AT *1 (Tenn.Crim.App. Mar. 15, 2002) (no app. filed).

Post-Conviction Proceeding

As noted the petitioner's post-conviction petition raised allegations of due process deprivations and deficient representation of counsel centering around a lack of any challenge at trial or on direct appeal to the jury instructions for second degree murder which failed ala State v. Page supra. to specify that a second degree murder was a "result-of-conduct offense." Also, as noted, the trial court summarily dismissed the petition. We hold that a summary dismissal was proper under the circumstances.

Tennessee Code Annotated section 40-30-106(f) provides in pertinent part with respect to post-conviction relief petitions:

> Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief . . ., the petition shall be dismissed.

Similarly, the Rules of the Tennessee Supreme Court regarding post-conviction petitions provides:

> In the event the court concludes after the preliminary review that a colorable claim is not asserted by the petition, the court shall enter an order dismissing the petition or an order requiring that the petition be amended.

Rule 28, § 6(B)(4)(a), Rules of the Supreme Court.

In this case there is no allegation that the petition was dismissed without an opportunity to amend or denied counsel, rather the only issue is whether the petition states a colorable claim requiring a hearing. See Burnett v. State, 92 S.W.3d 403 (Tenn. 2002). A "colorable claim" is presumably a claim that, if proven, would render the petitioner's conviction or sentence "void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Id. at 407; Tenn. Code Ann. § 40-30-203 (1997).

We hold that the petition in the instant case failed to establish a colorable claim because this Court has consistently held that any error in jury instructions under State v. Page, supra., is harmless beyond a reasonable doubt where, as in the

instant case, the defendant is convicted of first degree murder. This Court has reasoned that where the jury has concluded beyond a reasonable doubt that the defendant has "premeditated" or formed a preconceived design to assist or commit a murder the issue of intent to cause death is clearly resolved in favor of the State. State v. Hill, 118 S.W.3d 380, 386 (Tenn.Crim.App. 2002); State v. Douglas Marshall Mathis, No. W2001-02291 CCA-R3-CD (Tenn.Crim.App. at Nashville, March 3, 2004); State v. Robert Faulkner, No. W2001-02614-CCA-R3-DD (Tenn.Crim.App. at Jackson, Sept. 26, 2003). Thus, in the instant case, because the petitioner was convicted of first degree, premeditated murder, any failure of the trial court to adequately instruct the jury under Page was harmless beyond a reasonable doubt. It necessarily follows that because of the jury's first degree murder verdict counsel's failure to raise the Page issue either at trial or on appeal could not have prejudiced the petitioner. See Strickland v. Washington, 466 U.S. 668, 690-94, 104 S.Ct. 2052, 2054, 80 L.Ed.2d 674 (1984); Burnett v. State, 92 S.W.3d at 408 (holding that in order to establish a constitutional claim of ineffective assistance of counsel, counsel's allegedly deficient performance must have had a prejudicial effect on the outcome of the petitioner's case.)

Conclusion

In light of the foregoing it appears that the petition for post-conviction relief failed to state a colorable claim for relief and therefore summary dismissal was proper. The judgment of the post-conviction court is AFFIRMED.

***O'Baner v. State*, W2003-01945-CCA-R11-PC**
(Tenn. 2004)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MACK A. O'BANER v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P-27087

No. W2003-01945-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Mack A. O'Baner and the record before us, the application is denied.

PER CURIAM

FILED:
Nov 15, 2004
Clerk of the Courts

State v. Page, 81 S.W.3d 781 (Tenn. Crim. App. 2002)

Tennessee Reports

STATE v. PAGE, *81 S.W.3d 781* (Tenn.Crim.App. 2002)

STATE OF TENNESSEE v. JAMES NOBLE PAGE

No. M2001-01853-CCA-R3-CD.

In the Criminal Court of Appeals of Tennessee at Nashville.

Filed April 16, 2002.

Direct Appeal from the Criminal Court for Montgomery County; No.
40000192; John H. Gasaway, III, Judge.

Reversed; Remanded for New Trial.

Michael J. Love, Clarksville, Tennessee (at trial and on appeal), and
David L. Raybin, Nashville, Tennessee (on appeal), for the appellant,
James Noble Page.

Paul G. Summers, Attorney General and Reporter; David H. Findley,
Assistant Attorney General; John Wesley Carney, Jr., District Attorney

General; and James B. Crenshaw, Assistant District Attorney General, for
the Appellee, State of Tennessee.

Joe G. Riley, J., delivered the opinion of the court, in which Thomas T. Woodall and John Everett Williams, JJ., joined.

OPINION

JOE G. RILEY, JUDGE.

The juvenile defendant, fifteen-year-old James Noble Page, was tried as
an adult for second degree murder and convicted as charged by a Montgomery County jury. The specific issue in this appeal is whether the trial court erred in instructing the jury on the "knowing" mens rea element of second degree murder.[fn*] The trial court instructed the jury that the "knowing" element of second degree murder could be established by defendant's awareness "(1) that his conduct is of a particular
nature; or (2) that a particular circumstance exists; or (3) that the conduct was reasonably certain to cause the result." (Emphasis added). The state concedes the instruction was error but contends it was harmless. We conclude second degree murder is a result-of-conduct offense; allowing the jury to convict based upon awareness of the nature of the conduct or circumstances surrounding the conduct erroneously lessens the state's burden of proof for this offense; the error in the jury charge was not harmless under the facts of this case; and the conviction must be reversed and the case remanded for a
new trial.

On November 13, 1999, the fifteen-year-old defendant struck the eighteen-year-old victim in the head with a baseball bat

after a verbal confrontation; the victim died as a result of this injury. The defendant was transferred from Juvenile Court to the Criminal Court of Montgomery County to be tried as an adult and was indicted for second degree murder. After a jury trial, the defendant was convicted as charged and sentenced to fifteen years in the Department of Correction. This appeal followed.

FACTS

Sufficiency of the evidence is not an issue in this appeal. Nevertheless, it is necessary that we set forth certain trial evidence in order to place the challenged jury instruction in proper perspective.

On the evening of Saturday, November 13, 1999, the fifteen-year-old defendant and his teenage friends, Brian Rader, David Smith, Kris Perrone, Manuel Pritzl, and Dennis Pritzl, met at the Pritzls' home in Clarksville. Rader testified the defendant was upset and "grumpy" when he arrived. Rader stated the defendant told him he had argued with his mother and said he "felt like getting into a fight."

An adult purchased eighteen cans of beer for the boys with them defendant's money. The defendant drank several beers before the group left in Rader's truck to go to the bowling alley. Dennis Pritzl testified the defendant told him he drank seven beers. Both Dennis and Manuel Pritzl said the defendant had slurred speech.

The defendant was riding in the front passenger seat of the truck when it passed the eighteen-year-old victim, Chris Jones, who was walking with Pamela Hicks and her son, Tommy Hicks. The victim was holding hands with Pamela Hicks, his girlfriend, and the victim was carrying a knife inside his jacket.

As the truck passed, the defendant yelled at the victim and his companions. Rader, who was driving the truck, testified the defendant yelled, "Ooh! You're ugly!" Dennis Pritzl and Kris Perrone testified the defendant yelled, "Hey!" The victim then raised his middle finger to the truck in an obscene gesture. At the defendant's request, Rader turned the truck around and drove past the victim again. As they passed the victim, the defendant extended a baseball bat out of the window, nearly hitting the victim.

Rader stopped the truck. The boys exited the parked truck and yelled at the victim and his friends as they walked past. Tommy Hicks testified one of them asked the victim why he dropped out of school. Other witnesses stated the defendant yelled, "Why did you flip us off?" The victim and his friends did not respond, but the victim displayed a knife. The Pritzls stated the victim was "flipping" or "twirling" the knife in his hand. Dennis Pritzl said he saw the knife disappear as the victim walked past them. The victim and his companions continued walking.

The defendant returned to the truck and got the baseball bat. Holding the bat, he crossed the street and followed the victim, who continued walking away with his companions. The defendant returned to the truck where he resumed his place in the passenger seat, holding the bat between his legs. Rader stated the defendant asked him to turn around again because the defendant wanted to hit the victim with the bat. Rader turned the truck around, and again they passed the three on the side of the road. When the truck pulled into a driveway, the defendant exited the truck, still holding the bat.

The defendant followed the victim, Pamela Hicks, and Tommy Hicks, as they walked across a field toward Golf Club Lane. Smith testified the defendant was holding the bat

down at his side. Rader and Manuel Pritzl testified the defendant was taunting the victim as he walked behind him by asking, "Are you going to stab me?"

Pamela Hicks testified the victim was holding her right hand with his left hand, and his other hand was in his pants pocket. She and Tommy Hicks testified they were not holding a knife as they walked across the field, nor was the victim. Witnesses testified the victim and his companions never turned around to face the defendant, but instead continued walking with their backs to him. Manuel Pritzl testified he heard the victim tell the defendant, "You better leave me alone if you know what is good for you." David Smith and Dennis Pritzl stated they never saw the three behave aggressively toward the defendant or threaten him.

Pamela Hicks said the defendant approached the victim from behind and struck him over the head with the baseball bat. Witnesses testified they heard a loud sound as the bat struck the victim's head. Pamela Hicks stated she felt the victim's hand flex and drop her hand. She and Tommy Hicks said the victim took four or five steps before falling into the street. David Spears, who stopped to assist the injured victim, found a knife in the left breast pocket of the victim's jacket.

Immediately after the defendant struck the victim, he ran to the truck, threw the bat into the bed, and jumped in, yelling "Go!Go!Go!" just before the truck sped away. The group of boys returned to the Pritzl residence where the defendant used the bat to re-enact how he struck the victim. Dennis Pritzl testified the defendant said he thought the victim was going to turn and stab him, but the defendant's statement was inconsistent with his own observations during the incident. Manuel Pritzl testified the defendant did not think he had hit the victim hard.

The following Monday, the defendant and his friends were surprised to learn the victim had died. Dennis Pritzl stated the defendant said he was scared and did not know he hit the victim that hard. Manuel Pritzl testified the defendant said, "I'm getting sick," after learning of the victim's death. Dennis Pritzl, Manuel Pritzl, and Kris Perrone stated there was an agreement to say none of them was involved in the incident. The defendant was present for a short time while Manuel Pritzl burned the baseball bat.

Medical examiner Dr. Bruce Levy testified the victim had a large laceration on the back of his head, a skull fracture, and brain injury, all of which were caused by the same blow. Dr. Levy opined a full swing would have been necessary to cause the skull fracture, and the blow came from behind the victim. These injuries led to the victim's death.

The defendant testified that on the day of the victim's death, he had argued with his mother and was having problems at school. That evening, he went to the Pritzl residence and met his friends. He stated he drank eleven beers over a period of one and one-half hours and had not eaten a meal that day. According to the defendant, he was drunk when the group left in Brian Rader's truck to go to the bowling alley.

He testified he yelled "Hey!" out the window as the truck passed the three people walking on the side of the road because he thought he heard someone yell from the back of the truck. The defendant testified he asked the three people why they made the obscene gesture, but they did not respond. He stated he saw the victim "flipping" a knife. The defendant said he asked Rader for a baseball bat, and Rader handed one to him. He admitted he stuck the bat out of the window as they passed the victim, and he told Rader to turn the truck around.

The defendant testified he exited the truck and followed about ten feet behind the victim and his companions without saying anything. He said he carried the bat to "even the score" because the victim had a knife. The defendant said he asked the victim if he was going to stab him, and the victim replied, "Leave me alone before you get hurt."

According to the defendant, the victim and his companions slowed their pace as they approached Golf Club Lane after walking through the field, which allowed him to get within three feet of them. He said the victim had a knife clinched in his hand. The defendant stated he became scared when the victim started to turn toward him. The defendant testified he sped up to get closer to the victim before he swung the bat. He also said he did not intend to hit the victim in the head and did not know where he had struck him.

The defendant said he did not believe there was going to be a confrontation between him and the victim. He testified he had been intimidated after seeing the victim's knife and wanted to intimate the victim in return and "back him down." He testified he could not believe the victim had died.

Forensic psychiatrist Dr. Keith Caruso testified for the defense that, due to defendant's intoxication, the defendant lacked the substantial capacity to form the necessary mental state to knowingly kill the victim. Dr. Caruso stated the defendant's intent was to intimidate the victim rather than to attack him. The psychiatrist acknowledged the defendant knew he had a bat in his hand and knew he was swinging it at the victim. He opined the defendant did not intend to kill or hurt the victim, but did intend to strike the victim.

FINAL ARGUMENT

In final argument defense counsel conceded it was undisputed that the defendant hit the victim with the bat, thereby causing his death. Counsel further conceded the evidence did not justify self-defense. Instead, counsel argued the defendant was intoxicated, "didn't appreciate his conduct," had "no understanding of how wrong it was . . . how severe
it was at that time," and did not think he hit the victim "that hard." Counsel suggested the defendant committed criminally negligent homicide.

The state answered in its rebuttal argument that the defendant acted "knowingly" as that term would be defined in the instructions to be given by the trial court. Specifically, the state argued "knowingly" included "[acting] with an awareness that his conduct is of a particular nature." The state further argued "knowingly" could also be proven by showing "a person acts with an awareness that a particular circumstance exists, or that the conduct was reasonably certain to cause the result." The essence of the state's argument was that the defendant acted knowingly since he was aware of his acts and surrounding circumstances.

JURY CHARGE

The trial court charged the indicted offense of second degree murder and the lesser-included offenses of voluntary manslaughter, reckless homicide and criminally negligent homicide. The jury charge on second degree murder mirrored the state's argument as to its "knowing" *mens rea* requirement and was as follows:

> Any person who commits
> second degree murder is guilty
> of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

and

(2) that the defendant acted knowingly.

A person acts "knowingly" if that person acts with an awareness:

(1) that his conduct is of a particular nature; or

(2) that a particular circumstance exists; or

(3) that the conduct was reasonably certain to cause the result.

The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.

A person acts "intentionally" when that person acts with a

conscious objective or desire either:

(1) to cause a particular result; or

(2) to engage in particular conduct.

(Emphasis added).

In defining "intentionally or knowingly" as an element of voluntary manslaughter, the instructions referred to the previously-given definitions of those terms. The charge on the "reckless" element of reckless homicide referred to the unjustifiable risk either: "(1) that a particular result will occur; or (2) that a particular circumstance exists." (Emphasis added). The charge on the "criminal negligence" *mens rea* of criminally negligent homicide referred to "the circumstances surrounding that person's conduct or the result of that conduct. . . ." (Emphasis added).

As stated, the jury convicted the defendant of second degree murder.

ANALYSIS

The defendant contends the trial court's jury instruction defining the "knowing" *mens rea* element of second degree murder was erroneous. He argues (1) the definition was in the disjunctive and authorized a conviction based only upon an awareness of the nature of the conduct or that a particular circumstance exists; (2) the instruction did not require a finding that the defendant must be aware that his conduct was reasonably certain to cause death; (3) the instruction erroneously lessened the state's burden of proof; and (4) the

error was not harmless. The state concedes on appeal that the jury instruction was erroneous; however, it contends the error was harmless. We must agree with the defendant in all respects.

A. General Discussion of *Mens Rea*

There are four culpable mental states in Tennessee: intentional, knowing, reckless and criminal negligence. Tenn. Code Ann. § 39-11-302. The culpable mental state is generally set forth in the statute defining the offense. *See, e.g.,* Tenn. Code Ann. § 39-13-210(a)(1) (specifically stating the culpable mental state of a "knowing killing" in the definition for second degree murder) (emphasis added)). If a culpable mental state is not specified, then intentional, knowing or reckless will generally suffice. Tenn. Code Ann. § 39-11-301(c); *see, e.g.,* Tenn. Code Ann. § 39-13-503(a)(1) (defining rape as unlawful sexual penetration of a victim with force or coercion but not specifying a mental state; thus, making intentional, knowing, or reckless applicable).

Each of these mental states is defined with reference to two or three of the following possible conduct elements: (1) nature of defendant's conduct, (2) circumstances surrounding the defendant's conduct, and (3) result of the defendant's conduct. Tenn. Code Ann. § 39-11-302. "Intentional" can refer to the nature of defendant's conduct or the result of defendant's conduct. Tenn. Code Ann. § 39-11-302(a). "Knowing" can refer to all three of the conduct elements. *Id.* at (b). "Reckless" can refer to the circumstances surrounding defendant's conduct or the result of defendant's conduct. *Id.* at (c). "Criminal negligence" can refer to the circumstances surrounding defendant's conduct or the result of defendant's conduct. *Id.* at (d).

In addition, our code contemplates that the applicable conduct element (nature of the conduct, circumstances surrounding the conduct, and result of the conduct) for a given culpable mental state (intentional, knowing, reckless and criminal negligence) also depends upon the offense. *See* Tenn. Code Ann. § 39-11-201(a)(1), (2) (requiring, in order to convict, not only proof of the culpable mental state, but also proof of "the conduct, circumstances surrounding the conduct, or a result of the conduct described in the definition of the offense") (emphasis added)). Thus, although the definition of "intentional" includes both nature of the conduct or result of the conduct, one may not be applicable to a given offense. *See generally*, State v. Ducker, 27 S.W.3d 889, 896 (Tenn.
2000).

B. *Mens Rea* of Second Degree Murder

We first note that second degree murder can be committed by either a "knowing killing of another," Tenn. Code Ann. § 39-13-210(a)(1), or by the killing of another which results from the unlawful distribution of certain drugs, *id.* at (2). The killing relating to the distribution of drugs portion of the statute does not specify a particular culpable mental state. However, a "knowing killing" obviously requires the culpable mental state of "knowing."

We confine our analysis in this opinion to that form of second degree murder specifying the "knowing killing of another." Tenn. Code Ann. § 39-13-201(a)(1). "Knowing" is defined by statute as follows:

> "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances

> surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Tenn. Code Ann. §§ 39-11-106(a)(20), -302(b). However, a knowing second degree murder is strictly a "result-of-conduct" offense. *See* Ducker, 27 S.W.3d at 896. The result of the conduct is the only conduct element of the offense; the "nature of the conduct" that causes death is inconsequential. *Id.*

In fairness to the trial court, it was far from clear at the time of trial how the "knowing" *mens rea* for second degree murder should be defined in jury instructions.[fn1] The trial court's charge on the definition of "knowing" was verbatim from T.P.I. — CRIM 2.09 (5th ed. 2000). In Ducker, decided only months prior to the trial of this case, our supreme court did state that second degree murder was a "result-of-conduct" offense. 27 S.W.3d at 896. However, Ducker was not a second degree murder case; nor did Ducker discuss jury charges for result-of-conduct offenses. The actual holding in Ducker was that aggravated child abuse is a nature-of-conduct offense, rather than a result-of-conduct offense. *Id.* at 897. The first case to actually find reversible error in the failure to charge second degree murder as strictly a result-of-conduct offense was State v. Keith T. Dupree, No. W1999-01019-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 65, at *11 (Tenn.Crim.App. Jan. 30, 2001, at Jackson), *no perm to*

app. filed; however, Dupree was filed several days after the trial of this case. Furthermore, the trial court in Dupree charged only nature of the conduct and circumstances surrounding the conduct; it omitted entirely the result of the conduct element.

Regardless, as the state concedes, it is now established that a knowing second degree murder is strictly a result-of-conduct offense. Ducker, 27 S.W.3d at 896. A jury instruction that allows a jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the state's burden of proof. For second degree murder, a defendant must be aware that his or her conduct is reasonably certain to cause death. *See* Tenn. Code Ann. § 39-11-302(b); Dupree, supra.

C. Suggested Jury Instructions

A correct jury instruction for knowing second degree murder in this case would be as follows:

> Any person who commits second degree murder is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> (1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted knowingly.

"Knowingly" means that a person acts with an awareness that [his] [her] conduct is reasonably certain to cause the death of the alleged victim.

The requirement of "knowingly" is also established if it is shown that the defendant acted "intentionally."

"Intentionally" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.

In addition to knowing second degree murder, we also believe that voluntary manslaughter, reckless homicide and criminally negligent homicide are result-of-conduct offenses. Accordingly, the trial court erred by referring to the prior definitions of "knowing" and "intentional" in defining these offenses since the prior definitions included the nature of the conduct and circumstances surrounding the conduct. Although this is moot as it relates to these lesser-included offenses, we note the error for guidance upon retrial.

For further guidance to the bench and bar, we are attaching as an Appendix what we believe to be proper jury charges on premeditated first degree murder,[fn2] knowing second degree murder, voluntary manslaughter, reckless homicide and criminally
negligent homicide.

D. Harmless Error

We must now determine whether the erroneous jury instruction was harmless, as argued by the state. We first examine the appropriate standard of review.

(1) Standard of Review

A defendant has the constitutional right to complete and accurate jury instructions on the law; the failure to do so deprives a defendant of the constitutional right to a jury trial. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). The omission in jury instructions of an element of the offense is subject to constitutional harmless error analysis; namely, whether the state can prove harmless error beyond a reasonable doubt. State v. Walker, 29 S.W.3d 885, 893 (Tenn.Crim.App. 1999). We conclude an erroneous jury instruction, which misstates the applicable conduct element of an offense and lessens the state's burden of proof, is likewise subject to constitutional harmless error analysis.

(2) State's Argument

The state contends that defendant's reliance upon self-defense renders the error harmless beyond a reasonable doubt. Even if the defendant relied upon self-defense, we fail to see how this would necessarily be determinative of this issue. Regardless, defense counsel in final argument conceded the killing was not justified and, as to self-defense, stated, "I'm not going to pull your leg. I don't think there's enough there." Accordingly, we reject the state's contention.

(3) Trial Issues

We recognize that in many, if not most, homicide trials, the *mens rea* jury instructions utilized in this case would be harmless error. If a victim is shot at point blank range with a twelve gauge shotgun while asleep, and the defense is the defendant was not the shooter, then the erroneous instruction would likely be harmless. In such a situation, *mens rea* is not a disputed issue at trial. Similarly, if causation is not disputed in a homicide trial, the failure to instruct the jury on causation may well be harmless. *See* State v. Farner, 66 S.W.3d 188, 206 (Tenn. 2001).

Here, the *mens rea* of the defendant was indeed the disputed issue at trial. Since the defendant conceded an unlawful and unjustified killing, the only real issue at trial was the degree of homicide committed by the defendant. The defense theory was that the defendant was intoxicated, did not intend to hit the victim in the head, and did not intend to hit the victim "that hard." The essence of the defense theory was that this was not a "knowing killing," not a second degree murder, but was a criminally negligent homicide.

The state countered in its argument by specifically and improperly relying upon the nature of the conduct and circumstances surrounding the conduct, and contended it was not required to prove the defendant's awareness that his conduct was reasonably certain to cause death. The state's argument was subsequently, and erroneously, fully justified by the jury charge.

Since the only real issue at trial was the degree of homicide committed, which in turn rested upon the *mens rea* and appropriate conduct element, we are unable to conclude the erroneous jury instruction was harmless beyond a reasonable doubt. Accordingly, we must reverse andmremand for a new trial.

CONCLUSION

This court fully realizes the complexity and practical problems for the bench and bar in ascertaining, arguing and charging the proper *mens rea* and its applicable conduct elements for criminal offenses. It further appears to this panel that comprehensive revisions of pattern jury instructions may well be necessary.[fn3] Nevertheless, we believe the Tennessee statutes, modeled in large part after the American Law
Institute's Model Penal Code, must be followed and demand this result. *See* **Model Penal Code** § 2.02(2) (defining the culpable mental states with reference to nature of the conduct, circumstances surrounding the conduct, and result of the conduct).

Our criminal code is similar to the code adopted in Texas. *See* Tex. Penal Code §§ 6.02, -.03 (2002) (containing *mens rea* and conduct elements similar to those in Tennessee). Texas has confronted similar problems regarding jury instructions on nature of the conduct, circumstances surrounding the conduct, and result of the conduct. *See* Cook v. State, 884 S.W.2d 485, 490 (Tex.Crim.App. 1994) (finding error in jury charge on murder and voluntary manslaughter, both of which are result-of-conduct offenses, which did not limit "intentionally and knowingly" to result only language and remanding to Court of Appeals for harmless error analysis); Barcenes v. State, 940 S.W.2d 739, 743-44 (Tex.App. 1997) (holding defendant charged with murder, a result-of-conduct offense, is entitled to have definitions of "intentionally and knowingly" limited to result only language, but finding the error harmless). It appears we, like Texas, are unable to avoid the issue.

We reverse and remand for a new trial.

APPENDIX

SUGGESTED JURY CHARGES

FIRST DEGREE MURDER (PREMEDITATED KILLING) (FOR OFFENSES COMMITTED ON OR AFTER JULY 1, 1995)

Any person who commits the offense of first degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted intentionally.

> A person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim; [A defendant's conscious objective need not be to kill a specific victim. If you find beyond a reasonable doubt that the defendant intended to cause the death of a person, and that the defendant did so with premeditation, then the killing of another, even if not the intended victim, would be first degree murder;] and

(3) that the killing was premeditated.

A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time [he] [she] allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. If the design to kill was formed with premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect.
Furthermore, premeditation can be found if the decision to kill is first formed during the heat of passion, but the accused commits the act after the passion has subsided.

If you find from the proof beyond a reasonable doubt that the defendant is guilty of murder in the first degree, you will so report and your verdict in that event shall be "We, the Jury, find the defendant guilty of murder in the first degree".

[If you so find, then it shall be your duty after a separate sentencing hearing to determine whether the defendant will be sentenced to death, life imprisonment without the possibility of parole, or life in prison, but you will not consider punishment for this offense at this time.]

SECOND DEGREE MURDER

(KNOWING KILLING OF ANOTHER)

Any person who commits second degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted knowingly.

"Knowingly" means that a person acts with an awareness that [his] [her] conduct is reasonably certain to cause the death of the alleged victim.

The requirement of "knowingly" is also established if it is shown that the defendant acted "intentionally."

"Intentionally" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.

VOLUNTARY MANSLAUGHTER

Any person who commits voluntary manslaughter is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following elements:

(1) that the defendant unlawfully killed the alleged victim; and

(2) that the defendant acted intentionally or knowingly; and

(3) that the killing resulted from a state of passion produced by

adequate provocation sufficient to lead a reasonable person to act in
an irrational manner.

The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.

"Intentionally" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.

"Knowingly" means that a person acts with an awareness that [his] [her] conduct is reasonably certain to cause the death of the alleged victim.

RECKLESS HOMICIDE

Any person who commits the offense of reckless homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant killed the alleged victim; and

(2) that the defendant acted recklessly.

"Recklessly" means that a person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that its

disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of "recklessly" is also established if it is shown that the defendant acted intentionally or knowingly.

"Intentionally" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.

"Knowingly" means that a person acts with an awareness that [his] [her]conduct is reasonably certain to cause the death of the alleged victim.

CRIMINALLY NEGLIGENT HOMICIDE

Any person who commits criminally negligent homicide is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant's conduct resulted in the death of the alleged victim; and

(2) that the defendant acted with criminal negligence.

"Criminal negligence" means that a person acts with criminal negligence when the person ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would

exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly.

"Intentionally" means that a person acts intentionally when it is the person's conscious objective or desire to cause the death of the alleged victim.

"Knowingly" means that a person acts with an awareness that [his] [her] conduct is reasonably certain to cause the death of the alleged victim.

"Recklessly" means that a person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

[fn*] Defendant has assigned twelve issues for our review; however, all issues relate to the trial court's definitions of the *mens rea* requirements for homicides. Accordingly, we combine all issues into a single issue for purposes of this appeal.

[fn1] We also note this issue was not raised during trial, but rather was raised for the first time in the motion for new trial. Nevertheless, an erroneous or inaccurate jury charge, as opposed to an incomplete jury charge, is not waived by the failure to make a contemporaneous objection; it may be raised for the first time in the motion for new

trial. State v. Lynn, 924 S.W.2d 892, 899 (Tenn. 1996); State v. Eldridge, 951 S.W.2d 775, 779 (Tenn.Crim.App. 1997); Tenn. R. Crim. P. 30(b).

[fn2] Premeditated first degree murder requires not only that the killing be "intentional," but also that the defendant act with a "premeditated" mental state. Tenn. Code Ann. § 39-13-202(a)(1) (1997). "Premeditation" is defined by statute. *Id.* at (d). We conclude the "intentional" culpable mental state of premeditated first degree murder relates to the result of the conduct, just as the "knowing" culpable mental state of second degree murder relates to the result of the conduct. Accordingly, our suggested jury charge for premeditated first degree murder deviates from T.P.I. — CRIM 2.08 and 7.01(b) (5th ed. 2000) by deleting the reference to the nature of the defendant's conduct.

[fn3] We recognize that jury instructions on offenses other than homicides may need revisions. We caution the bench and bar that this opinion and suggested jury instructions only address certain homicide offenses.